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Nos. 08-289 and 08-294

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

THOMAS C. HORNE, SUPERINTENDENT OF PUBLIC INSTRUCTION IN THE STATE OF ARIZONA,

Petitioner,

V.

MIRIAM FLORES, ET AL.,

Respondents.

SPEAKER OF THE ARIZONA HOUSE OF REPRESENTATIVES and PRESIDENT OF THE ARIZONA SENATE,

Petitioners,

V.

MIRIAM FLORES, ET AL.,

Respondents.

On Petitions for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

COMBINED BRIEF IN OPPOSITION BY RESPONDENTS

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QUESTIONS PRESENTED

On January 24, 2000, the district court held that under the school finance system crafted by the State, Arizona's funding for English Language Learner (ELL) programs violated the Equal Education Opportunities Act (EEOA) because it was arbitrary and failed to provide school districts with the resources necessary to help their students overcome language barriers. Although Governor Jane Hull and Superintendant Lisa Graham Keegan decided not to appeal the judgment, for the next seven years, the Arizona legislature resisted complying with it. This contumacy forced the district court to issue multiple orders establishing deadlines for compliance. When the State failed repeatedly to meet the deadlines, the court threatened to impose monetary sanctions. At that point, two of the State's legislative leaders intervened to seek relief from the unappealed judgment. After an eight day evidentiary hearing, the court held that neither the law nor facts had changed in a manner that justified modification of the original judgment, which remained unsatisfied.

The questions presented are:

1. Whether given the above history, it is appropriate or necessary for this Court to review whether the Petitioners were entitled to relief under Rule 60(b)(5) where both lower courts applied the standard articulated by this Court?

2. Whether this Court should review the Court of Appeal's holding that the No Child Left Behind Act does not excuse the State's obligations under the EEOA, a holding that does not conflict with a decision of any other circuit court and is consistent with the legislative purposes of both statutes.

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Miriam Flores et al., Plaintiffs below, respectfully oppose the petitions for a writ of certiorari to review the judgment below of the United States Court of Appeals for the Ninth Circuit.[1]

The characterization of this case as "a serious threat to the ability of local officials across the country to deal creatively (and effectively) with their own local educational challenges" is completely false. L.I. Pet. at 2. As the Court of Appeals recognized below, since 2000 the principal issue has been the State's failure to comply with the judgment by adequately funding ELL education. The assertions by the Petitioners that the district court has involved itself in education policy decisions in Arizona and has had an "eight year reign" over Arizona schools are misrepresentation of fact. *Id.* The schools are not even before the court; moreover, as detailed below, the district court has not entered a single order that has required *them* to do anything. Every remedial order has been directed to the State Defendants and has related to the State's funding obligation. Throughout the history of this case, the district court has demonstrated extreme deference to the legislature and has at all times recognized that it is that body's responsibility to determine how it wants to meet its federal obligation to adequately fund ELL education.

The Petitioners' claim that the Court of Appeals failed to give appropriate deference to federal

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[1] Citations to the Petitions are designated as "Sup. Pet." for the Petition for Certiorari filed by Thomas C. Horne, the Superintendent of Public Instruction, and "L.I. Pet" for the Petition for Certiorari filed by the President of the Arizona Senate and Speaker of the Arizona House of Representatives, the Legislative Intervenors below.

policy judgments in the No Child Left Behind Act (NCLB) is likewise misguided. In their effort to avoid the State's obligation to adequately fund ELL programs, the Petitioners confuse the NCLB, which is voluntary, with the EEOA which establishes a state's mandatory obligation to ELL students.

Instead of recognizing the authority of the federal court and honoring the State's obligations under the EEOA, the Arizona Legislature has spent the past eight years resisting compliance with the district court's lawful order. In prodding the State toward compliance, the district court has repeatedly shown both deference and patience. As the Court of Appeals properly held, the Petitioners have failed to demonstrate any change in the facts or the law that would justify excusing the State from complying with the judgment. The Rule 60(b)(5) motion was properly denied and review of the decision by this Court is unwarranted.

STATEMENT OF THE CASE

Although this case was commenced in 1992, the events leading to the present petitions all occurred after the district court entered its Judgment.

A. The District Court's Judgment and Post-Judgment Orders.

On January 24, 2000, the district court held that under the school finance system crafted by the State legislature, Arizona's funding for ELL programs violated the EEOA because the additional amount allocated for ELL students under the State's weighted system ($150 per ELL student) bore no relation to the actual cost of educating those students and was inadequate, resulting in multiple program deficiencies. *Flores v. State of Arizona*, 172 F. Supp. 2d 1225, 1238 (D. Ariz. 2000).

The weighing factor for ELL students (also known as "Group B weight") was not devised by the district court but was part of the existing finance system at the time of judgment. It had been put in place in 1990 by the State legislature and was based on a cost study performed in 1987-88, which showed that on the average school districts were spending an additional $450 per ELL student. *Id.* at 1228.

Ten years later, the district court found the funding both arbitrary and inadequate. The State Defendants did not appeal the judgment. At the time that this decision was made, the Governor of the State was Jane D. Hull, a Republican, and the State Superintendent of Public Instruction was Lisa Graham-Keegan, also a Republican. The Attorney General was Janet Napolitano, a Democrat.

When, over the next seven years, the State failed to comply with the judgment by adequately funding ELL programs, the district court issued a series of remedial orders directed at the State and designed to promote compliance. These orders have consistently deferred to the State's prerogative to determine how it will fund ELL education and have only required generally that the State fund whatever ELL programs it adopts based upon the cost of implementing them. The district court has never required "earmarked" funding for ELL students or mandated any specific amount of funding. Because the Petitioners have so grossly mischaracterized the district court's actions in this case—actions that in fact demonstrate the district court's careful exercise of its discretion—a detailed summary of these events follows.

1. Plaintiffs' Initial Requests for Post-Judgment Relief

During the trial leading up to the judgment, the Defendants had informed the court that the Arizona legislature had established a legislative committee to conduct a cost study to determine the amount of funding provided by the state and federal governments for English instruction of ELL students and the amount of money being spent by schools to educate those students. *Flores v. Arizona*, 160 F. Supp. 2d 1043, 1044 (D. Ariz. 2000). That committee was required to submit a report that contained funding recommendations by December 1, 1999, more than a month before the judgment issued. Although the report was submitted timely, it failed to contain any recommendations on funding. *Id.* at 1045.

In view of the committee's failure to act as required by its own law, on February 11, 2000 Plaintiffs' counsel sent letters to members of both the Arizona House of Representatives and the Arizona State Senate informing them of the court's judgment that the State was in violation of the EEOA and asking legislators to take action in response to the court's ruling by performing a cost study to establish a minimum funding level for ELL programs. *Id.* No response was received to the letters and in April 2000, the legislature adjourned without taking any action to address the court's judgment. *Id.*

In June 2000, Governor Hull called a special legislative session on education funding but excluded ELL programs from the list of permissible items to be funded by a proposed state sales tax. *Id.* It was then that the Plaintiffs filed their first motion for

post-judgment relief on July 13, 2000. CR 203.[2] In that Motion, they requested that the court order the State to perform the cost study that it had advised the court it was going to perform—but had failed to even begin—prior to the next regularly scheduled legislative session which would convene in January 2001. *Id.*

The State resisted the Plaintiffs' motion, claiming that it was unrealistic to conduct a cost study prior to the next legislative session because, among other things, there was a proposition (Proposition 203) on the November ballot which, if passed by the voters, would repeal the existing bilingual education statutes and adopt sheltered English immersion as the State's educational methodology for ELL students. The State proposed instead that a cost study be completed within two years and suggested that the court schedule periodic status conferences to monitor the State's progress. CR 207.

In October 2000 the court rejected the Defendants' suggestion "to continue to delay appropriating adequate funding for [ELL] programs in Arizona" and described their argument that a cost assessment could not be done until after the vote on Proposition 203 as "brazen." 160 F. Supp. 2d at 1045-46. The court noted that it had made 64 specific findings of fact and not one had criticized the models being used to teach ELL students in Arizona. *Id.* at 1046. The inadequacies found by the court related to funding

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[2] Citations to the Record are to the district court docket and are designated as "CR" (Court Record) followed by the docket number.

and existed regardless of what methodology was used. *Id.*

Even so, the court recognized that the equitable relief that had been requested by the Plaintiffs "encroaches on a domain that primarily belongs to local government institutions, including the State's legislature." *Id.* at 1047. "Therefore, the Court exercises its equitable power conscientiously and takes every step to allow State authorities, whose powers are plenary, to decide how to provide [ELL] students with a meaningful [ELL] program." *Id.* Nevertheless, the court determined that it "must grant Plaintiffs' requested relief because without judicial action, the federal law violations. . .will continue for at least another three years." *Id.*

The court ordered that a cost study be prepared in a timely fashion so that the Arizona legislature could appropriate funding during the upcoming legislative session beginning in January 2001. The resulting cost study, however, was not submitted to the Arizona legislature until May 7, 2001. Three days later, the legislature adjourned without taking any action to appropriate adequate funding for language acquisition programs.

At this point, two legislative sessions had gone by since the judgment was issued without any action to comply with the judgment. As a result, the Plaintiffs returned to court on May 22, 2001 and asked that the district court establish a deadline for compliance with the judgment. CR 217. Despite the Defendants' request for a further delay, the judge granted the Plaintiffs' motion and ordered the State to comply by January 31, 2002 or at the conclusion of any earlier convened special session. CR 226.

2. Interim Legislation and The Cost Study.

In late 2001, a special session of the Arizona legislature was convened to consider addressing the issues in this case. The result was interim legislation designed to provide temporary funding for ELL programs while the legislature conducted yet another, more comprehensive, cost study. The legislation contained three elements. First, it increased the per student funding level for ELLs from $150 to $331. Second, it created three additional pools of funding for teacher training, compensatory instruction and instructional materials that were scheduled to lapse after three years. Third, the legislation authorized a comprehensive cost study to evaluate the costs of providing ELL instruction. The legislature gave itself until August 2004 to complete the cost study and have it evaluated by a joint legislative committee which would then make recommendations for consideration by the legislature at the legislative session convened in January 2005.

The Plaintiffs vigorously opposed this legislation as a stopgap measure that would only cause further delay. CR 234. The new funding level for ELLs was based on the amount that the Nogales Unified School District was actually spending on ELL programs, even though that was the very program that the court had held to be deficient and no effort had ever been made to determine whether that amount was sufficient. *Id.* Although the district court agreed that the new amount appropriated was as arbitrary as the original amount, it ultimately approved the legislation as an interim measure over the Plaintiffs' objections because at least the new funding level was related to something, however

misguided, and the legislative plan for a comprehensive cost study would provide the basis for making appropriate funding adjustments in the future. CR 257.

As the 2004 deadline for submitting the cost study approached, it became clear that the legislature did not like the preliminary results being reported and it began efforts to discredit the study it had commissioned. As a result of these attacks, instead of submitting the full study that was required by the legislation, the National Conference of State Legislatures ("NCSL"), the author of the study, submitted an Executive Summary which indicated. that funding for ELL programs needed to be increased by more than $1,000 per student CR 289.

With only an Executive Summary submitted by the NCSL, the legislative committee that had been established to evaluate the cost study failed to meet. Instead, its chairmen informed the Governor that without a cost study, there was nothing for the committee to do. CR 285, Exhibit A.

3. The January 2005 Order Establishes a Deadline.

With the January 2005 legislative session about to begin and with no recommendations from the legislative committee, the Plaintiffs returned to court and sought an order that would establish a deadline for compliance with the judgment at the end of the 2005 legislative session. CR 224. On January 28, 2005, the district court granted the Plaintiffs' motion observing that "the legislature has failed to meet the Court's deadlines as well as [its] own." CR 290 at 5. The Defendants were ordered to comply with the judgment by "appropriately and

constitutionally funding the State's ELL programs taking into account the Court's previous orders and the parties' stipulation." *Id.*

Despite this order, it was not until the penultimate day of the legislative session, May 12, 2005, that legislation was even introduced to address the district court's judgment. The legislation introduced, however, fell far short of complying with the judgment. Its principal defect was that it failed to provide funding based upon any known costs of delivering English acquisition programs. CR 296 at 3. Instead, the legislation provided an arbitrary funding increase of approximately $75 per ELL student for one year. After that, future funding was contingent upon the development of what the legislation called "research-based models."

The legislation was rushed through the legislative process in less than a day and the bill was transmitted to Governor Napolitano[3] who vetoed it on May 20, 2005.

As a result of the Governor's veto, the Defendants were in violation of the district court's January 28, 2005 order requiring compliance by the end of the legislative session. However, in the Governor's veto message, she invited the legislature to promptly work to achieve a bipartisan bill that "meaningfully addresses the Court's legitimate concerns." CR 296, Exhibit 1 at 2.

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[3] Governor Napolitano succeeded Governor Hull in 2002. Mr. Horne was also elected Superintendent of Public Instruction in 2002.

The Plaintiffs waited to assess the legislative response to the Governor's invitation but none was forthcoming. CR 296 at 4. With the temporary funding enacted under the earlier legislation expiring on July 1, 2005, the Plaintiffs had no choice but to pursue sanctions against the State. *Id.*

4. Plaintiffs' Motion for Sanctions and Injunctive Relief.

On August 2, 2005, the Plaintiffs filed their Motion for Sanctions citing the State's indifference and outright legislative resistance to compliance. The Plaintiffs' Motion asked the court to terminate federal highway funding to the State or, alternatively, to impose fines for its continued failure to comply. On December 15, 2005, the district court granted the Plaintiffs' motion. CR 335. It rejected the Plaintiffs' proposal to enjoin the receipt of federal highway funds but approved an escalating schedule of fines designated to begin fifteen days after the beginning of the 2006 legislative session if the Defendants had not complied with the judgment by that time. CR 235 at 13-14.

Despite the district court's Order, no legislation was enacted to address this case within the first fifteen days of the 2006 legislative session so the fines began to be assessed on January 25, 2006. The legislature finally reacted by twice passing legislation similar to the 2005 legislation that had been vetoed by the Governor. Both bills were vetoed. Finally, the legislature removed a corporate tuition tax credit from the bill and the Governor decided to allow the legislation, HB 2064, to become law without her signature; she made it clear, however, that she did not believe the legislation satisfied the judgment. CR 376, Exhibits A, B.

By the time all was said and done, the State had incurred $21 million in fines. [4]

B. HB 2064

Shortly after HB 2064 was passed, the Speaker of the Arizona House of Representatives and the President of the Arizona Senate requested Leave to Report to the Court the Adoption of House Bill 2064. CR 373. The State also filed a motion requesting expedited consideration of the bill. CR 374; 375. A few days later, the Speaker and President filed a Motion seeking to Intervene as Defendants along with a Motion to Purge the State of contempt and to dissolve the injunction. CR 382. The Motion to Intervene was granted and the parties were instructed by the district court to submit briefs on whether HB 2064 satisfied the judgment. CR 390. The Petitioners both took the position that the bill satisfied the judgment. CR 382, 414, 434. The Plaintiffs, the State of Arizona and State Board of Education, all took the position that the bill was fatally flawed and the judgment remained unsatisfied. CR 415, 419.

As noted above, HB 2064 was basically the same legislation that the Governor had vetoed over a year earlier on May 13, 2005. It provided almost exactly the same amount of funding for ELL programs as the previous legislation. Retaining the formulaic funding used by the State, it increased the Group B weight—the additional amount allocated to cover the costs of educating ELL students—from

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[4] The fines were subsequently vacated by the Ninth Circuit Court of Appeals when it remanded the matter to the district court for an evidentiary hearing (see *infra*).

approximately $355 per ELL student to $432 per ELL student, or an increase of $77 per student. HB2064, Sec. 13, 47th Leg., 2d Reg. Sess. (Ariz. 2006) . This small funding increase in the Group B weight, however, was deceptive because it also included a new two year limitation on receipt of Group B weight funds for each ELL student. Because most ELL students take more than two years to become proficient, the so-called funding increase actually represented a significant funding decrease for districts with large ELL populations.

The legislation also established an Arizona English Language Learners Task Force ("Task Force") to develop and adopt research-based models of structured English immersion programs for use by school districts and charter schools. HB 2064, Sec. 4, (adding Ariz. Rev. Stat. §15-756.01(C)). In addition to developing "models," the Task Force was also charged with establishing a form for school districts and charter schools to request additional funding for the models. HB 2064, Sec. 4, (adding Ariz. Rev. Stat. § 15-756.01(I)). However, the legislation specified that school districts could only apply for additional funding after offsetting: 1) Title I and II funds received for students who are also ELL students; 2) all Title III funds received; 3) any federal impact funds received for students who are also ELL students; 4) a portion of any desegregation funds received (based on the percentage of students who are ELLs); and 5) the Group B weight funds received. *Id.* Further, as noted earlier, the legislation prohibited school districts and charter schools from including the costs of any student who has been classified as an English language learner for more than two years in the budget request. *Id.*

1. The District Court's First Order Holding that HB 2064 Did Not Satisfy the Judgment.

On April 26, 2006, the district court determined that HB 2064 failed to satisfy the judgment in this case and also failed to comply with federal law. CR 448. The court acknowledged that the landscape with regard to ELL programming had changed since judgment was entered in the case and that some progress had been made in the Nogales Unified School District with regard to improved academic success for some elementary and junior high school students. *Id.* at 2-3. But, the district court noted, the EEOA had not changed and it still required the State to provide funding for ELL students that is not arbitrary and capricious. *Id.* at 3. Additionally, the court determined that it is still the law that a state may not consider the use of federal funds to determine the eligibility of a school district or charter school for state funding or the amount of any state aid. *Id.* Finally, the court held that the NCLB did not supersede the State's duty to properly fund ELL programs. *Id.*

More fundamentally, the court determined that the cost of implementing ELL programs had not been established by the legislation. CR 448 at 4. The legislation failed to establish minimum standards for providing funding as required by the judgment, making it impossible for the court to determine whether the funding was rational or adequate. *Id.* Therefore, the court could not determine if the $77 increase bore any relationship to the actual cost of the ELL programs or if it adequately funded them.

The court held that because federal funds are to supplement, not supplant, state funds for educa-

tion and the legislation required school districts to use federal funding to finance a state obligation, it violated federal law. *Id.* at 5. The district court also determined that the legislation's attempt to redirect locally generated desegregation funding for ELL purposes was unlawful. *Id.* at 6. Finally, the district court determined that the legislation's two-year limitation on funding for ELL students violated the EEOA. The court held that the EEOA does not impose a time limitation and the State's funding obligation is a continuing one until students have overcome language barriers that impede their participation. *Id.* at 7-8. Thus, while a two-year period for becoming English proficient might be a laudable goal, terminating funding after two years whether or not proficiency had been achieved was unlawful. *Id.*

Although the district court held that the legislation failed to satisfy the judgment and the court's subsequent remedial orders and violated federal law, it did not invalidate the legislation but simply referred the parties back to the court's December 16, 2005 order which directed the State to comply with the judgment. *Id.* at 8.

2. Appeal and Remand

The Petitioners appealed the Court's April 26, 2006 Order and on August 23, 2006, in a Memorandum Decision, the Ninth Circuit Court of Appeals ruled that the district court "should have held an evidentiary hearing and made findings of fact regarding whether changed circumstances required modification of the original order or otherwise had a bearing on the appropriate remedy." Memorandum at 7. The Court of Appeals vacated the April 25, 2006 order rejecting HB 2064 and remanded the case to the district court. *Id.*

In January 2007, the district court held an eight day evidentiary hearing. Without exception, all of the data offered by Plaintiffs at the hearing proved that State funding for ELL programs is a fraction of what it should be.

On March 22, 2007 the district court issued its ruling which included Findings of Fact and Conclusions of Law. CR 638. The district court denied the Legislative-Intervenors' Rule 60(b)(5) Motion for Relief from the judgment. It held that neither the changes in education funding nor HB 2064 satisfied the judgment and further found, as it had previously, that HB 2064 violated federal law in multiple respects. The district court ordered the State to comply with the judgment by the end of the 2007 legislative session. *Id.* That is the Order that is the subject of the Petitioners' appeals.[5]

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[5] As the Court of Appeals noted in its Opinion, there have been further proceedings before the district court. Sup. Pet. at App. 91. On November 21, 2008, the district court concluded an 11 day evidentiary hearing regarding the sufficiency of the State's 2008 appropriation to fund the models adopted pursuant to HB 2064. The parties are scheduled to submit post-hearing briefs and proposed findings of fact and conclusions of law by the end of January 2009. CR854.

REASONS FOR DENYING THE PETITIONS

A. The Ninth Circuit's Statement and Application of the Standards for Rule 60(b)(5) Relief Do Not Conflict With the Decisions of Any Other Circuit and Are Consistent with This Court's Precedent.

The Legislative Petitioners' argument that the Court of Appeals applied incorrect law when it reviewed the district court's denial of their 60(b)(5) motion misrepresents both current law and the actions of the lower court.

First, the Legislative Petitioners suggest that the Court of Appeals applied an improper standard of review. L.I. Pet. at 18 ("Instead of determining whether the district court's orders were appropriate in view of dramatic changes in federal requirements, the court of appeals applied a highly deferential standard of review.") Not so. The "abuse of discretion" standard of review used by the Court of Appeals to review the district court's decision is the standard that this Court has held should be used when reviewing the denial of a Rule 60(b)(5) motion. *Agostini v. Felton*, 521 U.S. 203, 238 (1997). Moreover, the Court of Appeals acknowledged that even under this standard of review, its "review is somewhat closer in the context of institutional injunctions against States 'due to federalism concerns' implicated by such injunctions." Opinion, reprinted at Sup. Pet., App. 1, at App. 52[6] quoting *Hook v. Arizona Dep't of Corr.*, 107 F.3d 1397, 1402 (9th Cir. 1997).

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[6] Citations to the Court of Appeals' opinion are to the copy of the opinion in the Appendix to the Superintendent's Petition.

Thus, the Court of Appeals explained, "[i]n such contexts, '[w]e scrutinize the injunction closely to make sure that the remedy protects the Plaintiffs' federal constitutional and statutory rights but does not require more of state officials than is necessary to assure their compliance with federal law.'" Opinion, Sup. Pet. at App. 52 quoting *Clark v. Coye*, 60 F.3d 600, 604 (9th Cir. 1995). Consequently, when it reviewed the district court's action, the Court of Appeals undertook an independent and exhaustive examination of the factual record and, in its 90-page opinion, addressed in detail each and every argument advanced by the Petitioners. The accusation that the appellate court was improperly deferential to the district court is simply not supported by the law or the facts.

Second, the Petitioners' attempt to create controversy over the Court of Appeals' articulation of the requirements to obtain relief under Rule 60(b)(5) does not hold up under scrutiny. From the outset of its analysis, the Court of Appeals cited the seminal cases from this Court that establish the framework for determining when relief is appropriate in institutional reform cases. Opinion, Sup. Pet. at App.49 citing *Agostini v. Felton*, 521 U.S. 203, 215 (1997) and *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 384 (1992). The Court of Appeals properly observed that *Rufo* sets forth a general, flexible standard for all petitions brought under the equity provision of Rule 60(b)(5) and that it is appropriate to grant relief when the party seeking relief meets its initial burden by showing "a significant change either in factual conditions or in law." *Id.* quoting *Agostini*, 521 U.S. at 215. The Court of Appeals further held that once that showing is made, modification of the judgment may be warranted if changed

facts make compliance more onerous or enforcement of the decree without modification detrimental to the public interest. *Id.* Finally, the appellate court noted that modification is necessary if a consent decree or injunction "'become[s] impermissible under federal law.'" *Id.* quoting *Rufo*, 502 U.S. at 388.

The contention that the standard articulated by this Court and applied by the Ninth Circuit Court of Appeals in this case was different or more rigid than the standards applied by other circuit courts is simply not true. The various circuit cases cited by the Legislative Petitioners apply the same rule applied in this case. For example, the Petitioners assert that the Eleventh Circuit has stated that compliance with technical terms of a decree is not required and that in evaluating a request for modification the court must look at the basic purpose of the decree. L.I. Pet. at 23 citing *Reynolds v. McInnes* 338 F.3d 1221, 1226 (11th Cir. 2003). Yet, as the *Reynolds* court noted, "[i]f the provision that a party seeks to modify 'is central to the decree, or . . . 'the most important element' of the decree, then the modification is likely to violate the basic purpose of the decree and, therefore, will be forbidden.'" 338 F. 3d at 1226 *quoting United States v. City of Miami,* 2 F.3d 1497, 1504-05 (11th Cir. 1993).

That is precisely what the Ninth Circuit did in this case. What the Legislative Petitioners fail to acknowledge is that, unlike the Defendants in *Reynolds* who sought to modify only one of twenty-one articles in a consent decree, the "modification"[7] they

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[7] In fact, the Legislative Petitioners did not seek to modify the judgment but rather sought to be either excused from

(continued on following page)

sought in this case did, in fact, go to the core of the original judgment. As the Court of Appeals explained, the basic premise of the original judgment was that the State's failure to set a minimum base funding level per ELL student that was both adequate and rationally related to costs was a violation of the EEOA. Opinion, Sup. Pet. at App. 61-62. "[F]or eight years the parties have litigated based on that premise." *Id.* at App. 69. Continuing to demand that the State take action to comply with that requirement of the judgment "does not miss the forest for the trees. It cuts to the heart of this case, which has been about such funding since 2000...." *Id.* Further, as the Court of Appeals noted,

> Nor have the fundamentals of the Arizona school funding system changed in any way that undermines the district court's original conclusion that incremental ELL funding is what matters for EEOA purposes. Accepting the Superintendent and Legislative Intervenors' argument would be to hold that the funding restrictions and categories used by Arizona are meaningless. As we have explained, Arizona allocates ELL funding *on top* of base level support. HB 2010 and HB 2064 have followed this approach. This statutory scheme is still premised on the idea that ELL programming imposes costs *additional* to those covered by ordinary base level funding. (emphasis in original.)

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complying with it altogether or to be deemed to have satisfied it. CR422.

Id. at App. 69-70. Thus, the Petitioners' request to be excused from providing minimum base level funding for ELL students that was both adequate and not arbitrary went to the very core of the original judgment.

The Legislative Petitioners argue that the unappealed judgment was the equivalent of a consent decree and that this fact caused the Court of Appeals to apply an inappropriate standard under Rule 60(b)(5). L.I Pet. at 22. The actual analysis of the Court of Appeals, however, contradicts this contention. At the outset of its discussion of whether the Petitioners were entitled to relief under Rule 60(b)(5), the court observed that although this case was unusual because neither the original judgment, nor the earlier post-judgment orders had been appealed, it nonetheless acknowledged that "there are some instances, likely rare, in which a prior judgment is so undermined by later circumstances as to render its continued enforcement inequitable even though neither appealed nor complied with." Opinion, Sup. Pet. at App. 60-61. The fact that this case did not present one of those instances had nothing to do with the failure to appeal the original judgment. Rather, after a thorough review of the evidence and discussion of the the legal arguments raised by Petitioners, the Court of Appeals determined that "just as no changes in fact have eliminated the premises of the Declaratory Judgment, no changes in law have done so either." *Id.* at App. 82.

The court then considered the Petitioners' claim that the recently enacted legislation, HB 2064, satisfied the judgment. Like the district court before it, the Court of Appeals found that the provisions of HB 2064 did not constitute compliance because the two year funding cut off was arbitrary; the increase

in Group B weight was inadequate; and the reliance upon federal funds in calculating state aid violated federal law. *Id.* at App. 85-87. Thus, because the judgment remained unsatisfied and the State continues to violate the EEOA, the Court of Appeals concluded "it is not inequitable to continue to require compliance." *Id.* at App. 92.

Contrary to the Legislative Petitioners' assertion that "the Ninth Circuit's decision cannot be squared with decisions of other courts of appeals holding that under a court-imposed injunction, a party 'can only be required to address ongoing illegal activity or the past effects of illegal activity" –that is, continuing "violations of substantive federal law," the court's opinion is completely consistent with the authorities cited from other circuits. L.I. Pet. at 24 quoting *Alexander v. Britt,* 89 F. 3d 194, 199-200 (4th Cir. 1996) In concluding that the district court did not abuse its discretion in denying the Rule 60(b)(5) motion, the Court of Appeals determined that the State had not only failed to comply with the original Declaratory Judgment but also confirmed that the State's failure constituted a continuing violation of federal law. *See, e.g. Evans v. City of Chicago,* 10 F. 3d 474, 477-79 (7th Cir. 1993)(there must be a "substantial federal claim, not only when the decree is entered but also when it is enforced.").

In sum, both the district court and the Court of Appeals applied the correct standard in deciding the Petitioners' Rule 60(b)(5) Motion. The Motion was denied because the Petitioners failed to demonstrate that there was a change in either the facts or law that would make enforcement of the judgment inequitable. Review by this Court of that lengthy and fact-specific determination is unwarranted.

B. The Lower Courts' Determination that the NCLB Reinforces—and Does Not Diminish—a State's Obligation Under the EEOA to Provide Adequate Funding for ELL Programs Is Not In Conflict With Any Decision of This Court or Any Other Circuit Court, and Is Consistent with the Legislative Purposes of Both Statutory Schemes.

In rejecting the Petitioners' argument that compliance with the NCLB excused their obligation to adequately fund ELL programs under the EEOA, the Court of Appeals properly recognized the different, albeit complementary, purposes of the two statutory schemes.

The relevant provision of the EEOA provides that:

> No State shall deny equal educational opportunity to an individual on account of his or her race, color, sex, or national origin, by - -
>
> (f) the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.

20 U.S.C. § 1703(f). Because Congress failed to define what constitutes "appropriate action" under the EEOA, it has been left to the courts to interpret.

In *Castaneda v. Pickard*, the Fifth Circuit Court of Appeals developed a three-prong test for determining compliance with the EEOA. *Castaneda v. Pickard*, 648 F.2d 989 (5th Cir. 1981). First, the State must adopt a recognized methodology for delivering English acquisition services to ELLs. (As

noted above, the Plaintiffs have never contested the State's methodology in this case. English immersion was adopted by Arizona voters over eight years ago and all of the cost data generated since then has been based on that methodology.) Second, the State must devote the necessary resources to transform the methodology into reality. (That has been the problem in this case.) And, third, the program must produce results indicating that language barriers confronting students are actually being overcome. *Castaneda,* 648 F.2d at 1009-1010. This three-step analysis has been adopted by courts as the principal test for determining what constitutes "appropriate action" under the EEOA. *See, e.g. Gomez v. Illinois State Board of Education,* 811 F.2d 1030 (7th Cir. 1987); *Teresa P. v. Berkeley Unified School Dist.*, 724 F. Supp. 698 (N. D. Cal. 1989); *Keyes v. School District No. 1, Denver, Colorado,* 576 F. Supp. 1503 (D. Colo. 1983); *Debra P. v. Turlington,* 564 F. Supp. 177 (M.D. Fla. 1983).

In this case, the district court applied the *Castenada* test and concluded that the State had failed to satisfy the second part:

> Defendants are violating the EEOA because the State has failed to take appropriate action to remedy language barriers in NUSD, in that, despite the adoption of a recognized [ELL] program in NUSD, the State has failed to follow through with practices, resources and personnel necessary to transform theory into reality.

172 F. Supp.2d at 1239. The district court squarely placed the responsibility for adequately funding ELL programs on the State. Nothing happened in the last

eight years that would render the analytical framework set forth in the district court's judgment outmoded. It remains the applicable law binding on the State.

The Petitioners' suggestion that the NCLB somehow renders the EEOA and *Castaneda* obsolete has absolutely no merit. In claiming that the NCLB fills the "gap" recognized in *Castaneda* (L.I. Pet, at 32) the Petitioners not only confuse the very different purposes of the two statutes, as the Court of Appeals recognized, but also ignore the fact that unlike the "appropriate action" requirement of the EEOA, any "detailed requirements" imposed by the NCLB are only applicable if a State elects to receive federal funding. As Petitioners' themselves acknowledge, Arizona can "opt out" of the NCLB and forego federal education funding. L.I. Pet. at 10. The State, however, cannot "opt out" of the EEOA. Thus, although Arizona has the option of electing to avoid the requirements of the NCLB and forego federal funding, if it were to make that election, it would not be excused from taking "appropriate action" under the EEOA. Clearly, any voluntary obligations undertaken by the State pursuant to the NCLB are in addition to its mandatory obligations under the EEOA.

The fact that NCLB imposes requirements different from the "appropriate action" required by the EEOA is further reinforced by the fact that States may only use the federal funds provided under Title III of the NCLB to "supplement, not supplant" the level of State and local public funds that would otherwise be expended for ELL programs. 20 U.S.C. § 6825(g). This provision, which is consistent with other federal education funding legislation, does not allow the State to use federal funds to provide ser-

vices that the State is otherwise obligated to provide under federal, State or local law.

As the United States Department of Education, the federal agency responsible for implementing the NCLB, explained in a recently-issued guidance on Title III's supplement not supplant rule:

> States, districts, and schools are required to provide core language instruction educational programs and services for limited English proficient (LEP) students. This requirement is established based on Title VI of the Civil Rights Act of 1964, and its implementing regulations, as interpreted by the Supreme Court of the United States (including the Supreme Court's ruling in Lau v. Nichols), and based on other significant case law (including Castaneda v. Pickard), the Equal Educational Opportunities Act of 1974, and other Federal, State, and local laws. Therefore, the use of State or subgrantee Title III funds to provide core language instruction educational programs, including providing for the salaries of teachers who provide those core services for LEP students, would violate the supplement not supplant provision in section 3115(g) of the Act, as such services are required to be provided by States and districts regardless of the availability of Federal Title III funds.

October 2, 2008 United State Department of Education Guidance reprinted in the Appendix at App.3. [8]

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[8] The guidance, which simply reiterates the Department's long-standing policy on "supplement not supplant" also mentions that "[t]he Department has encountered situations in

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Finally, as the Court of Appeals explained, the two statutes, while complementary, serve different purposes. The EEOA, adopted in 1974, is an anti-discrimination statute enforceable through a private right of action. 20 U.S.C. §§ 1703(f),1706. Under the EEOA, "an individual denied an equal educational opportunity . . . may institute a civil action in an appropriate district court of the United States against such parties, and for such relief, as may be appropriate." *Id.* at §1706.

NCLB on the other hand is directed at schools and the academic success of their students. Every court that has considered the issue has held that there is no private cause of action under NCLB. *See Fresh Start Academy v. Toledo Bd. of Educ.*, 363 F. Supp. 2d 910 (N.D. Ohio 2005); *ACORN v. NY City Dept. of Educ.*, 269 F. Supp. 2d 338 (S.D. N.Y. 2003); *Stokes v. United States Dept. of Educ.*, 2006 U.S. Dist. LEXIS 46838, 2006 WL 1892242 (D. Mass. July 10, 2006); *Blanchard v. Morton Sch. Dist.*, 2006 U.S. Dist. LEXIS 59417, 2006 WL 2459167 (W.D. Wash. Aug. 25, 2006); *Coachella Valley Unified Sch. Dist. v. California*, 2005 U.S. Dist. LEXIS 44825, 2005 WL 1869499 (N.D. Cal. Aug. 5, 2005).

Further, no portion of NCLB prescribes a particular or appropriate remedial language program or provides a remedy in the event such a program is not

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which a State proposed to implement a law to reduce the amount of State aid available to local educational agencies (LEAs) for implementing language instruction educational programs for LEP students based on the amount of Title III funds its LEAs receive. Such statutes and policies violate Federal law." App. 4. Notably, the situation described is exactly what has occurred in Arizona under HB2064.

provided. In fact, Title III, Part A of NCLB specifically provides, " [n]othing in this part shall be construed -- . . . (2) to require a State or a local educational agency to establish, continue, or eliminate any particular type of instruction program for limited English proficient children . . ." 20 U.S.C. § 6845. Therefore, as long as a school is making "adequate yearly progress," NCLB provides no "remedy" whatsoever even if some of the students in the school are being denied their constitutionally guaranteed right to language instruction.

Finally, any doubt that the EEOA and the cases interpreting it remain the controlling law with respect to the State's obligation to provide English language instruction is totally eliminated by the additional provision in NCLB that "[n]othing in this part shall be construed in a manner inconsistent with any Federal law guaranteeing a civil right." 20 U.S.C. § 6847. Thus, rather than replacing *Castaneda* and the other cases that have construed the EEOA, by including this affirmation, NCLB reinforces their continued applicability.

C. Neither the District Court Nor the Court of Appeals Usurped the State's Discretion to Determine How to Comply with the Judgment and the EEOA.

Finally, the Petitioners' argument that the lower courts in this case overstepped their authority in requiring compliance with the judgment is disingenuous. In advancing their argument, the Petitioners misrepresent or overlook several key facts. First, as the Court of Appeals recognized, this case is primarily about funding. The Orders at issue in this appeal all address the State's failure to adequately fund ELL programs in Arizona. Plaintiffs have

never challenged the methodology used by the State to instruct ELL students. Further, any issues with respect to services provided to ELL students were resolved without trial and were agreed to in the Consent Order, the terms of which have been codified into the State's education regulations. Arizona Administrative Code. 10 A.A.R. 353, effective March 8, 2004 (Supp. 04-1). The only unresolved dispute has been the State's failure to provide school districts with adequate funding to cover the costs of the required programs.

Second, in seeking this Court's review, the Petitioners accuse the Court of Appeals of "ruling that Arizona must enact legislation and create an earmarked funding source to fund the 'incremental costs' of ELL education..." Sup. Pet. at 10. See also L.I. Pet. at 29 ("The Ninth Circuit's decision turns on the premise that the EEOA's mandate that States take 'appropriate action' to overcome language barriers requires State legislatures to provide substantial funding earmarked for ELL programs.") The Court of Appeals, however, did no such thing. Nor has the district court. It is *the State* that created a school finance system where funding is calculated by first establishing a "base funding level" for all students and then allocating additional funds for those students who require more resources to educate, such as ELL students, gifted students and students with disabilities. Ariz. Rev. Stat. §15-943. It is *the State* that has adopted the system of incremental costs. The district court simply held, and Court of Appeals agreed, that *under this system that the State has adopted* the additional funding allocated for ELL students must be adequate and based on actual cost, not an arbitrary amount. The core requirement of the judgment is that having adopted an appropriate

methodology, the State must provide resources to implement that methodology, i.e. funding that is both adequate and not arbitrary. Neither the district court nor the Court of Appeals has ever *required* the State to maintain the weighted system it created in 1980 and continues to use today.

Third, the Petitioners' accusation that the Court of Appeals has "permit[ed] the district court to micromanage Arizona's funding of ELL programs," L.I. Pet. at 34, is demonstrably false. Similarly false are their assertions that "the district court anointed itself overseer of Arizona's public schools and enmeshed the federal judiciary in enduringly sensitive questions of local educational policy" and "the district court's orders are imposing requirements on Arizona's schools that are significantly out of step with current federal educational policies and requirements." L. I. Pet at 6 and 9.

Unfortunately, this gross distortion of the district court's conduct in this case comes as no surprise. For the past eight years, as the Arizona legislature has continually shown the district court nothing but contempt, the district court has demonstrated remarkable restraint and has been entirely deferential toward that body. Every order entered by the district court has given the State complete discretion to adopt whatever funding system it wanted, provided that the funding for ELL programs was neither inadequate nor arbitrary. Not a single order has been entered that imposed *any* requirement on Arizona schools. Indeed, before this recent claim that the district court was "micromanaging" education in Arizona, the Legislative Intervenors attempted to avoid being held in contempt for their failure to comply with the judgment by asserting that the district court's orders were directed only at

"the State" and did not require *them* to do anything. CR677. The fact is the district court has been a model of judicial restraint and has given the State complete discretion to determine how it will comply with the requirements of the EEOA. The Petitioners' claims to the contrary are completely baseless.

CONCLUSION

For the foregoing reasons, the Petitions for Writ of Certiorari should be denied.

Respectfully submitted,

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December 1, 2008

The Office of Elementary and Secondary Education and the Office of English Language Acquisition are issuing this guidance to provide States with information on several funding issues, including "supplement not supplant" requirements, under Title III of the ESEA. This guidance represents the Department's current thinking on these issues. It does not create or confer any rights for or on any other person. Furthermore, this guidance does not impose any requirements beyond those required under applicable law and regulations. If you are interested in commenting on this guidance, please email the Department at oela@ed.gov or write to us at the following address: U.S. Department of Education, Office of English Language Acquisition, Lyndon Baines Johnson Building, 400 Maryland Avenue, SW, Room 5C-132, Washington, DC 20202-6510.

Supplement Not Supplant Provision of Title III of the ESEA

Section 3115(g) of Title III of the ESEA (hereafter "Title III") provides as follows:

> SUPPLEMENT, NOT SUPPLANT -- Federal funds made available under this subpart shall be used so as to supplement the level of Federal, State, and local public funds that, in the absence of such availability, would have been expended for programs for limited English proficient children and immigrant children

> and youth and in no case to supplant such Federal, State, and local public funds.

In practice, the prohibition against supplanting under Title III means that recipients may not use those funds to pay for services that, in the absence of Title III funds, would be necessary to be provided by other Federal, or State, or local funds. [1]

While the Department recognizes that, to date, some States may have interpreted the provision above as not applying to funds the State is able to retain for State-level activities under section 3111(b)(2), it is the Department's interpretation of the law that the supplement not supplant provision of Title III applies to both funds retained for State activities – including the professional development, planning and evaluation, technical assistance, and providing recognition activities described in section 3111(b)(2) – and Title III funds expended by subgrantees.

OMB Circular A-133, which offers general guidance on the application of supplement not supplant provisions, explains that, generally, a supplanting violation is presumed when an institution uses Federal funds to provide services that it is required to make available under other Federal,

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[1] Title I, Part A of the ESEA (hereafter "Title I") also includes a similar "supplement not supplant" provision in section 1120A(b). The "supplement not supplant" provision in Title I prohibits the supplanting of non-Federal funds. A significant distinction between the "supplement not supplant" provision in Title III and the "supplement not supplant" provision in Title I is that the Title III provision prohibits supplanting of Federal, as well as State and local, funds, whereas the Title I provision prohibits only the supplanting of State and local funds.

State, or local laws. See the 2008 Circular A–133 Compliance Supplement which, in accordance with 73 Fed. Reg. 32059 (June 5, 2008), is available at the following Internet address:

http://www.whitehouse.gov/omb/circulars/a133_compliance/08/ed.doc

Supplanting and Provision of Language Instruction Educational Programs

States, districts, and schools are required to provide core language instruction educational programs and services for limited English proficient (LEP) students. This requirement is established based on Title VI of the Civil Rights Act of 1964, and its implementing regulations, as interpreted by the Supreme Court of the United States (including the Supreme Court's ruling in Lau v. Nichols), and based on other significant case law (including Castaneda v. Pickard), the Equal Educational Opportunities Act of 1974, and other Federal, State, and local laws. Therefore, the use of State or subgrantee Title III funds to provide core language instruction educational programs, including providing for the salaries of teachers who provide those core services for LEP students, would violate the supplement not supplant provision in section 3115(g) of the Act, as such services are required to be provided by States and districts regardless of the availability of Federal Title III funds.[2]

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[2] State and local education agencies (SEAs and LEAs) have raised a few questions regarding supplanting issues under consolidated funding arrangements or within Title I schoolwide

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Reducing State and Local Funding on the Basis of the Amount of Title III Funds A Local Educational Agency (LEA) is Eligible to Receive

The Department has encountered situations in which a State proposed to implement a law to reduce the

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programs. Under section 1114 of the ESEA, an LEA that fully consolidates Title III funds with other State, local, and Federal funds as part of a schoolwide program does not, in expending Title III funds, have to meet most of the statutory requirements of that program, including the non-supplanting requirement set out in section 3115(g) of the ESEA. Each school, however, must identify the specific programs being consolidated, and the amount each program contributes to the consolidation, and maintain records that demonstrate that the schoolwide program addresses the intent and purposes of each of the Federal programs whose funds are being consolidated to support the schoolwide program. In addition, while section 3115(g) would not apply to a schoolwide program that consolidates Title III funds with other Federal funds, section 1114(a)(2)(B) establishes a specific non-supplanting requirement for schoolwide programs. Under that provision, each school operating a schoolwide program must receive all the State and local funds it would otherwise receive to operate its educational program in the absence of Title I, Part A or other Federal education funds, "including funds needed to provide services that are required by law for...children with limited English proficiency." The Department has recently issued non-regulatory guidance on Title I fiscal issues, including on the consolidation of funds in Title I schoolwide programs. This guidance, which updates and modifies prior guidance on schoolwide programs issued by the Department, can be found on the Internet at the following address: http://www.ed.gov/programs/

titleiparta/fiscalguid.doc.

amount of State aid available to local educational agencies (LEAs) for implementing language instruction educational programs for LEP students based on the amount of Title III funds its LEAs receive. Such statutes and policies violate Federal law. Section 9522 of the ESEA specifically prohibits a State from taking into consideration payments under any ESEA program (with the exception of Impact Aid) in determining the amount of State aid an LEA receives for the free public education of its children. Furthermore, any reduction in the amount of State funds an LEA receives to implement language instruction educational programs based on the receipt of Federal funds for its LEP population under Title III violates the non-supplanting provision of Title III.

Likewise, any efforts by an LEA or school to reduce State and local funds expended to implement language instruction educational programs serving LEP students based on the receipt of Federal Title III grant funds also violates the non-supplanting provision of Title III. In the absence of these Federal funds, LEAs would still be required to provide language instruction educational services and would need to expend funds to serve LEP students. For example, the Department has encountered numerous Title III subgrantees that, for budgetary reasons, use Title III funds to pay the salaries of their English as a Second Language (ESL) teacher. Typically, ESL teachers provide the core language instruction educational program services and their salaries are the responsibility of States and LEAs, not the Federal Government.

As a general rule, the use of Title III funds to pay for services to LEP students that were paid for in prior years with State, local, or other Federal funds also raises a presumption of a violation of the Title III

non-supplanting requirement. An LEA may be able to rebut this presumption, however, if it can demonstrate, through contemporaneous documentation, that it would not have continued to provide those services for LEP students with State, local, or other Federal funds because, for example, of budgetary constraints or competing educational priorities.

Use of Title III Funds to Develop ELP Assessments

A number of States have asked the Department to provide more specific information on the allowable uses of Title III funds to pay for the costs of developing ELP assessments, which are required under both section 1111(b)(7) of Title I and section 3113(b)(2) of Title III of the ESEA. This section of this letter addresses this particular issue.

Generally, a State or an LEA that is a Title III subgrantee cannot – without violating the non-supplanting requirement set out in section 3115(g) – use Title III funds to pay for the costs of developing annual ELP assessments. This is because section 1111(b)(7) requires States and LEAs to:

> provide for an annual assessment of English proficiency (measuring students' oral language, reading, and writing skills in English) of all students with limited English proficiency in the schools served by the State educational agency.

Because Title I requires States to administer annual ELP assessments, in general it would be a violation of Title III supplement not supplant requirements to use Title III funds to develop such assessments. This is because, in the absence of Title III funds, States

would still be required to develop and administer an annual ELP assessment under Title I.

Note that the supplement not supplant provision applies to all funds made available under subpart A of Title III, including funds the State retains for State-level activities under section 3111(b)(2). The Department recognizes that some States may have, to date, interpreted the supplement not supplant provision of Title III as not applying to State-level activities, as section 3111(b)(2)(C)(iii) allows States to reserve funds to help subgrantees with such activities as "identifying or developing, and implementing measures of English proficiency." However, because of the Title III prohibition against supplanting other Federal funds, there are only limited circumstances under which Title III funds reserved under section 3111(b)(2) may be used for costs related to ELP assessments.

Under Title III, State educational agencies (SEAs) are required under section 3113(b)(2) to develop ELP standards. The ELP assessments administered to determine whether Title III subgrantees are meeting Annual Measurable Achievement Objectives (AMAOs) under Title III must be aligned with the State's ELP standards. Because the alignment of the ELP assessment with ELP standards is not a requirement that an ELP assessment would otherwise have to meet under Title I, a State may use Title III State Activity funds it receives under section 3111(b)(2) to either:

(1) pay for the costs of developing an ELP assessment, separate from the ELP assessment required under Title I, that is aligned to the State's ELP standards, or

(2) pay for the costs of enhancing an existing ELP assessment required under Title I in order to align it with the State's ELP standards required under Title III.

If, as is typically the case, a single ELP assessment is used in a State to meet both the requirements of Title I and Title III, only the costs that were incurred specifically to meet Title III requirements not otherwise required under Title I may be paid for with Title III funds.

Use of Title III Funds to Administer ELP Assessments

Several States and LEAs have requested information from the Department about whether Title III State Activity funds and/or LEA subgrant funds may pay for the costs associated with administration of a State's annual ELP assessment. Specifically, States and LEAs have asked whether Title III funds may be used to pay for substitute teachers during test administration, for the scoring or reporting of ELP assessment results, for training incentives related to administering the ELP assessment, or for materials or equipment related to the administration of annual ELP assessments.

In general, the cost of administering such assessments may not be paid with Title III funds, including funds reserved by the State for State-level activities, because Title I already requires States to administer an annual ELP assessment to all LEP students.

In the case where a separate ELP assessment is administered for the purposes of Title III only, the costs associated with administering such an assessment may be paid with Title III funds, but only to the extent that those costs are over and above what

would be required to administer the ELP assessment required to be administered to all LEP students in the State under Title I.

Therefore, in general, Title III State and subgrantee funds may not be used to pay for substitute teachers or materials or for the cost of scoring State ELP assessments administered to LEP students, as these activities are all related to the administration of a State's annual ELP assessment required under Title I.

However, in cases in which a State has a separate or particular assessment for Title III purposes only, or prepares separate reports of student, school or LEA performance for Title III purposes only, Title III funds may be used for activities over and above what would have been in place absent the Title III requirements.

Use of Title I and other Federal Funds for State ELP Assessments

There are funds available from Title I and other Federal programs to help States develop and administer their ELP assessments.

For example, there is specific statutory authority for an SEA to use Title I State administrative funds, either alone or consolidated with other ESEA administrative funds, to develop State ELP assessments. This authority is found in section 9201(f) of the ESEA, which states: "In order to develop challenging State academic standards and assessments, a State educational agency may consolidate the amounts described in subsection (a) [consolidation of State administrative funds under any ESEA program or other program designated by the Secretary] for those

purposes under Title I." Because section 1111(b)(7) of Title I requires annual ELP assessments, the Department believes that section 9201(f) authorizes the use of State administrative funds for this purpose.

In addition, section 6111 of the ESEA, which provides additional funds to States for assessments and related activities, specifically permits a State to use those funds "to pay the costs of the development of the additional State assessments...required by section 1111(b)," which includes annual ELP assessments. Further, section 6111(2) specifically permits the use of 6111 funds to administer the assessments required by section 1111(b), but only after development of the assessments is complete.

Finally, the Department has awarded competitive enhanced assessment grant funds under section 6112 to consortia of States to develop ELP assessments in compliance with Title III.

Screening and Placement Assessments for LEP Students

While most of the discussion above focuses on the annual ELP assessments States are required to develop and administer to track the progress of LEP students' attainment of English language skills, it should also be noted that States and LEAs are responsible for identifying LEP students who may need language education services, regardless of their receipt of Federal funds. Many States and LEAs have developed language assessments used for the purposes of screening students for language proficiency and placing students into core language instruction educational programs. The development and administration of such screening or placement

assessments may not be paid for out of Title III or Title I Federal funds. This is because States and LEAs would be required to identify and make placement decisions for LEP students even without Federal funding. Thus, it would violate both the Title I and Title III "supplement not supplant" provisions to use such Federal funds for the development or administration of LEP screening or placement assessments.